

**2007 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION
FACTS FOR FINAL ROUND (BOTH TEAMS)**

INSTRUCTIONS: The final negotiation session is based on the same fact pattern as the earlier rounds. The confidential instructions from the earlier rounds, however, do not apply to this round. Reliance on the confidential instructions for previous rounds will not help and could harm your case. Please review the new information for both teams (below) and the new confidential instructions. Formulate a negotiation strategy. The final round negotiation will be 90 minutes. The final negotiations session is between the UberPower on one hand and BEV and ZAP (together) on the other.

ADDITIONAL FACTS:

UberPower walked out of negotiations with both BEV and ZAP and is threatening to shut down all UberPower wind projects in California. In addition, Mermin has been lobbying hard with the Governor's Office and the Energy Commission for favorable wind turbine siting regulations and guidelines for future projects. She has also found a sponsor for legislation that would create exemptions under California law for bird kills resulting from interactions with wind turbines.

Meanwhile, BEV and ZAP have been criticized by other environmental groups (as Mermin had hoped) and in the press for their opposition to wind power in the face of global warming. Jefferson in particular has been surprised at the reaction to UberPower's threat to leave California. At the urging of the national BEV organization, Jefferson contacted D'Agastino, extended an olive branch, and suggested that BEV and ZAP join forces. D'Agastino agreed, and, in a move taking Mermin by surprise, the two groups have proposed a single negotiation for resolution of the outstanding issues. Mermin has agreed to the session, which will focus on the following:

1. Legislation allowing take exemptions for wind turbines;
2. Turbine siting requirements;
3. Studies and Review.

2007 ENVIRONMENTAL NEGOTIATIONS COMPETITION
CONFIDENTIAL INSTRUCTIONS FOR UberPower (You represent UberPower)
FINAL ROUND

While Mermin's statements about leaving California have been, to a certain extent, posturing, she must shortly make decisions about repowering at Diego Flores. If UberPower is to install new units this year, it must ship turbines within the month. Otherwise, those turbines will be shipped to Texas for a project there. This case must be resolved, one way or another. For Mermin, the issues are primarily about money and risk. You should bargain hard and get the best deal, but Mermin believes that, at the end of the day, UberPower can make money in California, and would like to reach an agreement if possible.

1. Legislation. Mermin sees a significant opportunity. Currently, under California law, there are no "take" exceptions for raptors, meaning that killing any raptor is illegal. Mermin recognizes that she cannot get the law changed without environmental group support. The current version of the proposed legislation, AB 26, is modeled after the federal Migratory Bird Treaty Act language, which reads:

"The Secretary of the Interior is authorized and directed from time to time . . . to determine when, to what extent, if at all, and by what means, it is compatible with [the Act] to allow hunting, taking, capture, killing . . . of any such bird."

Mermin believes that, left to agency discretion, she will obtain some form of take permit for operation of the turbines. A broad provision will also ensure substantial support across different industries and groups. Environmental groups have strongly opposed AB 26 as currently drafted. Mermin wants an exemption for the turbines, so she really does not care if the language of the legislation remains broad or not. She does know that BEV and ZAP are very worried about the broad language and will probably compromise on other areas of a settlement in exchange for UberPower's support for a more narrowly drawn provision. As long as the language exempts incidental bird kills for wind turbines, you can agree to support a change in the proposed legislation, but you should get concessions on other issues in exchange.

2. Siting. For Mermin, siting is about money. She wants as much flexibility as possible to site turbines in less expensive locations and to take adaptive management actions on a case-by-case basis, usually starting with the least expensive actions. Mermin concedes that studies show that turbines on the east side of the ridge, in the neighborhood of one hundred feet from the ridgeline, do less harm to birds. Unfortunately, the east side of the slope is often steep. Moving one hundred feet from the ridgeline is difficult and expensive. Mermin will agree (try and do better)

- a. to build on the east side, but wants to be able to build close to the ridgeline;
- b. each turbine will be no closer than thirty-five feet from the ridgeline;
- c. UberPower will make reasonable efforts to site turbines closer to one hundred feet from the ridgeline;
- d. at least 30 percent of the turbines will be at least 75 feet from the ridgeline; BUT
- e. In order to retain flexibility, Mermin wants to be able to site no less than seven percent of the turbines in the best "engineering" location without reference to the ridgeline, even if this means siting on the west side.
- f. If necessary, you can agree to have an independent engineer, funded jointly, review

the siting plans to determine if the siting is reasonable.

3. Studies and Review. The County has structured a Scientific Advisory Panel (SAP), which reviews monitoring protocols and results. Based on the results, the SAP makes recommendations for additional monitoring and for adaptive management actions for reduction of bird kills. All parties have generally agreed to this process, but Mermin wants some limits. First, she seeks a cap on annual costs of monitoring. Second, she seeks a cap on the annual cost of adaptive management actions.

- a. Mermin wants a \$2 million limit on annual monitoring costs. She knows that it is unlikely that BEV and ZAP will agree. As fall backs, she will agree to up to \$3 million per year, or to a process that requires County Board of Supervisor approval of the SAP monitoring requirements each year. She believes that UberPower may have some luck with the political process.
- b. Adaptive management can be expensive. Mermin wants a \$2 million annual cap. She knows that this is unrealistic, given that some measures could cost as much as \$10 million. She could agree to a \$20 million total for all measures for the life of the project, or for a lower total with a Board of Supervisor approval for any expenditure exceeding the lower total.

It is up to the parties how to proceed with this negotiation.

2007 ENVIRONMENTAL NEGOTIATIONS COMPETITION

CONFIDENTIAL INSTRUCTIONS FOR BEV and ZAP (You represent BEV and ZAP)

FINAL ROUND

BEV and ZAP have an uneasy alliance. Lucas Jefferson believes that Alix D'Agastino is too willing to settle. Nonetheless, they agree that a united front provides the best opportunity for a good deal. Your representation, of course, should reflect no disagreement.

1. Legislation. Currently, under California law, there are no “take” exceptions for raptors, meaning that killing any raptor is illegal. Environmental groups have universally the current version of the proposed legislation, AB 26, which is modeled after the federal Migratory Bird Treaty Act language. It reads:

“The Secretary of the Interior is authorized and directed from time to time . . . to determine when, to what extent, if at all, and by what means, it is compatible with [the Act] to allow hunting, taking, capture, killing . . . of any such bird.”

Environmental groups fear that left to its discretion, the agency will provide multiple take and killing permits and undermine the protections of the Act. BEV and ZAP recognize, however, that some incidental harm to raptors is inevitable with the operation of wind turbines, and that, in light of global warming, wind turbine operation is needed. BEV and ZAP are worried about the proposed legislation, as it is garnering support from industry and hunting groups, despite environmental opposition. You can agree to support a change to the legislation that would allow a narrow exemption for wind turbine operation. The devil, of course, is in the details. You do not want to allow exemptions for operations that fail to minimize impacts on raptors. You can agree to the general concept of a narrowly drawn exemption for wind turbines operated for minimization of harm to birds. You will work with UberPower and the bill's author to get the correct language. If time permits, you can try and work with UberPower to outline what the turbine operators would have to do to obtain the exemption.

2. Siting. Studies show that turbines on the east side of the ridge, in the neighborhood of one hundred feet from the ridgeline, do less harm to birds. Unfortunately, the east side of the slope is often steep. Moving one hundred feet from the ridgeline is difficult and expensive. BEV and ZAP recognize that siting all turbines in this fashion may be problematic, but they want as many as possible. You should get UberPower to agree to build on all of the turbines the east side, with as many as possible close to or at one hundred feet from the ridgeline. You can agree, at a minimum (try and get more), that

- a. some turbines can be closer to the ridge than one hundred feet, but no turbine will be any closer than twenty feet from the ridgeline;
- b. UberPower must make all reasonable efforts to site turbines closer to one hundred feet from the ridgeline;
- c. at least 20 percent of the turbines will be at least 75 feet from the ridgeline.
- d. You can agree that some minimal number or percent of turbines can be sited based on engineering needs, even west of the ridgeline if necessary, if UberPower insists as a matter of need.
- e. You should try and get an agreement to have an independent engineer review the siting plans to determine if the siting is reasonable. BEV and ZAP cannot fund the engineering review, so try and get UberPower to do so. If you cannot get a funding agreement, just get an agreement to allow review; we'll worry

about funding later.

3. Studies and Review. The County has structured a Scientific Advisory Panel (SAP), which reviews monitoring protocols and results. Based on the results, the SAP makes recommendations for additional monitoring and for adaptive management actions for reduction of bird kills. All parties have generally agreed to this process. Now, Mermin wants some limits. BEV and ZAP are strongly opposed, but are willing to try and craft some form of face-saving for Mermin if possible.

- a. BEV and ZAP will not agree to any limit on annual monitoring costs. SAP should be allowed to do the science that it needs to do. If they must, BEV and ZAP can agree to a process that requires County Board of Supervisor approval of the SAP monitoring requirements when monitoring costs exceed \$3 million a year.
- b. Adaptive management can be expensive, but it is essential. BEV and ZAP will not agree to any annual cap, but again can agree to a process that requires County Board of Supervisor approval if adaptive management actions for the entire project exceed \$18 million.

It is up to the parties how to proceed with this negotiation.